

November 25, 2015

Mr. Rick Outzen
Publisher
Independent News
Post Office Box 12082
Pensacola, Florida 32591

Re: The City's Ground Lease Agreement dated August 24, 2012 with Divine Word Communications, Inc., an Alabama Corporation, d/b/a Divine Word Radio, Inc., for the purpose of constructing and operating a commercial communication tower within the Long Hollow drainage basin

Dear Mr. Outzen:

Subsequent to my legal opinion dated November 23, 2015, you have asked me to provide you with a legal opinion regarding the validity of the above dated ground lease and the City's issuance of building permits for the construction of the subject tower. A copy of my legal opinion is attached as Exhibit A and incorporated herein by reference in its entirety and for any and all purposes as if fully set forth herein.

Based upon the facts as presented, legal research and conclusions contained within my legal opinion dated November 23, 2015, it is my legal opinion the City's aforementioned approved and executed ground lease agreement dated August 24, 2012 and any subsequently issued building permits were acts contrary to Florida Statutes, the City's Comprehensive Plan, hereinafter referred as the "Plan", and the City's own Land Development Code of Ordinances, herein after referred to as the "LDC". Florida law prohibits a municipality to exercise its power in violation of the Florida Constitution, Florida Statutes and the City's own governing ordinances. The City lacked the authority to take the above stated actions under Florida Statutes and its own governing laws. According to Florida Law and Florida case law, the City's actions were ultra vires acts and therefore, null and void. The subject tower should be removed.

As earlier opined, Florida Statutes, the City's Plan and the City's LDC specifically prohibited the replacement/restoration, extension, expansion and enlargement of the original Long Hollow drainage basin commercial communication tower structure and the extension, expansion and enlargement of the tower's use. The original Long Hollow drainage basin commercial communication tower was a non-conforming structure and non-conforming use as defined by the City's LDC. Commercial communication towers were/are specifically prohibited within the zoning district in which it is located and used. Since the original commercial communication tower

existed prior to the enactment of the City's LDC, the original tower and its use were allowed to continue to exist with conditions. F.S. § 163.3177(6)(a)(2)(e) of Florida Statutes, Objective FLU-1.2 of the City's Plan and Section 12-1-6 of the City's LDC, entitled "Non-Conforming lots, structures and uses" governed the structure and use separately.

Chapter 163 of Florida Statutes requires the elimination of non-conforming structures and uses which are inconsistent with the character of the community. (F.S. § 163.3177(6)(a)(2)(e)). The City's Plan prohibits existing non-conforming land uses which are incompatible or inconsistent with the Plan to be expanded, enlarged and/or rebuilt. (Objective FLU-1.2 of the City's Plan). Section 12-1-6(C) of the City's LDC declares that a non-conforming structure may be maintained but not enlarged in a way that increases its nonconformity. Section 12-1-6(D) of the City's LDC states that a non-conforming use cannot be extended to occupy any greater area of land or extended to occupy any land outside any buildings on the same parcel. Finally, Section 12-1-6(E) of the City's LDC only authorizes the restoration of a non-conforming structure, by right, if the non-conforming structure is destroyed to the extent of not more than seventy-five (75) percent of its value by fire, explosion, or other casualty, or act of God, or the public.

The removal of the original 250 foot +/- tower and the construction of a newer, larger, 350 to 400 foot tower constituted a replacement/restoration, extension, expansion and enlargement of a nonconforming structure and extension, expansion and enlargement of a non-conforming use in violation of the City's Plan and the City's LDC. The replacement/restoration permitted perpetuation of the non-conforming structure and the extension, expansion and enlargement of a non-conforming use contrary to the clear and stated intent of the regulations contained in Chapter 163 of Florida Statutes, the City's Plan and the City's LDC. These regulations were enacted to promote the eventual elimination of all non-conforming structures and non-conforming uses while safeguarding the rights of persons affected.

Further, Chapter 163 of Florida Statutes requires that all development approved by the City be consistent with the City's Plan and the City's LDC. In the instant case, the City's action(s) was/were not consistent with the City's Plan and the City's LDC, and thus, was/were not permitted and/or authorized by Florida law.

In support of my opinion, I offer the following:

FACTUAL BACKGROUND

According to the City Attorney, on November 1, 1974, a portion of the Long Hollow drainage basin was previously leased by the City to Pensacola Broadcasting Corporation for use as a radio tower and antenna site; and pursuant to the lease terms, a radio tower was lawfully constructed and operated in compliance with the City's open space zoning classification in which the Long Hollow drainage basin was located. Subsequently, in 1991, during the initial term of the lease, the open zoning classification was changed to a conservation district, hereinafter, referred to as a "CO" district, a zoning classification under the City's LDC. Section 12-2-44(2) of the City's LDC, commercial communication towers was/are specifically prohibited within a CO district. As a result of the change in zoning district and the prohibition of commercial communication towers, the then

pre-existing Long Hollow drainage basin commercial communication tower, became a non-conforming structure and a non-conforming use.

On August 24, 2012, the City of Pensacola executed a lease with Divine World Radio, a not for profit organization. The lease required Divine World Radio to demolish and allowed the replacement of the Long Hollow drainage basin commercial communication tower at Divine World Radio's expense. Subsequently, while the original 250 +/- tower remained operational, Divine World Radio constructed a new, larger, 350 to 400 foot commercial communication tower adjacent to the original tower within the Long Hollow drainage basin. Eventually, the original tower was demolished.

LEGAL ANALYSIS

The Municipal Home Rule Powers Act, herein referred to as the "Act", as adopted by the Florida legislature provides municipalities with the governmental, corporate, and proprietary powers to enable them to conduct municipal government, perform municipal functions, and render municipal services, and may exercise any power for municipal purposes, except when expressly prohibited by law. (F.S. § 166.021(1)). The provisions within the Act are to be construed as to secure for municipalities the broad exercise of home rule powers granted by the Florida Constitution. (F.S. § 166.021(4)). It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the Florida Constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. (F.S. § 166.021(4)).

As stated within my legal opinion dated November 23, 2015, the original Long Hollow drainage basin commercial communication tower was a non-conforming structure and non-conforming use as defined by the City's LDC. (*See Section 12-1-6(A), Section 12-1-6(C), Section 12-14-1 and Section 12-14-1 of the City's LDC respectively*). Commercial communication towers were/are specifically prohibited within the zoning district in which it is located and used. Since the original commercial communication tower existed prior to the enactment of the City's LDC, the original tower and its use were allowed to continue to exist with conditions. F.S. § 163.3177(6)(a)(2)(e) of Florida Statutes, Objective FLU-1.2 of the City's Plan and Section 12-1-6 of the City's LDC, entitled "Non-Conforming lots, structures and uses" governed the structure and use separately.

Chapter 163 of Florida Statutes requires the elimination of non-conforming structures and uses which are inconsistent with the character of the community. (F.S. § 163.3177(6)(a)(2)(e)). The City's Plan prohibits existing non-conforming land uses which are incompatible or inconsistent with the Plan to be expanded, enlarged and/or rebuilt. (Objective FLU-1.2 of the City's Plan). Section 12-1-6(C) of the City's LDC declares that a non-conforming structure may be maintained but not enlarged in a way that increases its nonconformity. Section 12-1-6(D) of the City's LDC states that a non-conforming use cannot be extended to occupy any greater area of land or extended to occupy any land outside any buildings on the same parcel. Finally, Section 12-1-6(E) of the City's LDC only authorizes the restoration of a non-conforming structure, by right, if the non-conforming structure is destroyed to the extent of not more than seventy-five (75) percent of its value by fire, explosion, or other casualty, or act of God, or the public.

On November 23, 2015, I opined that, the removal of the original 250 +/- foot tower and the replacement of a newer, larger, 350 to 400 foot tower constituted the replacement/restoration, extension, expansion and enlargement of a non-conforming structure. Further, the extension, expansion and enlargement of the structure also constituted an extension, expansion and enlargement of tower structure's non-conforming use. Both in violation of the City's Plan and the City's LDC.

Further, the replacement/restoration permitted perpetuation of the non-conforming structure and the extension, expansion and enlargement of a non-conforming use contrary to the clear and stated intent of the regulations contained in Chapter 163 of Florida Statutes, the City's Plan and the City's LDC. Id. at 683. These regulations were enacted to promote the eventual elimination of all non-conforming structures and non-conforming uses while safeguarding the rights of persons affected. Id.

As it pertains to the instant case, Florida Law requires that all development undertaken by, and all actions taken in regard to development orders by, a local government in regard to land must be consistent with the City's Plan as adopted. (F.S. § 163.3194(1)(a)). As stated, the City's action(s) was/were not consistent with the City's Plan and the City's LDC, and thus, was/were not permitted and/or authorized by Florida law.

In 2009, the Florida Supreme Court addressed "ultra vires" corporate actions in a case to determine whether or not the Florida Bar Board of Governors' act to permit the voluntary Family Law Section of the Florida Bar to file an amicus brief in a pending litigation was in violation of the Bar's own standing board policies. Liberty Counsel v. Florida Bar Board of Governors, 12 So.3d 183, 189 (Fla. 2009). The Court held that the actions of the Florida Bar were not outside of the Bar's authority and thus, did not constitute an ultra vires act, requiring the Florida Supreme Court, in the exercise of its supervisory authority over the Bar, to grant an injunction preventing the filing of the amicus brief. Id. at 191.

The Court noted within its decision the following definitions for "ultra vires" acts:

"Black's Law Dictionary defines an "ultra vires" act as one that is "unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." See Black's Law Dictionary 1559 (8th ed.2004). Although there is no case from this Court discussing the concept of "ultra vires" actions from the standpoint of the activities of the Bar or its sections, a 1940 case from this Court discussed the concept in terms of a corporation:

Thompson on Corporations states that an act of a corporation is ultra vires "when it is outside the objects for which the corporation was created as defined by the laws of its organization and limited by the statutes authorizing its existence. In other words, it is an unauthorized act. In its primary sense, an act is "ultra vires" the powers of a corporation when it is wholly outside of the scope of the purposes for which the corporation was formed or has its being, and which it has no authority to perform under any circumstances or in any mode." Knowles v. Magic City Grocery, 144 Fla. 78, 197 So. 843, 844 (1940).

Further, Florida courts have held that a municipality, county, or town engages in an “ultra vires” act when it lacks the authority to take the action under statute or its own governing laws. See, e.g., Lykes Bros., Inc. v. City of Plant City, 354 So.2d 878, 880 (Fla.1978) (“As to whether a city's tax exoneration contract is valid, our decisions uniformly hold that municipal contracts promising not to impose taxes, or granting tax exemptions, are “ultra vires” and void in the absence of specific legislative authority.”); Town of Lauderdale-by-the-Sea v. Meretsky, 773 So.2d 1245, 1249 (Fla. 4th DCA 2000) (“[T]he Town Commission authorized an act contrary to its own ordinances and, therefore, its approval was “ultra vires” and void.”) Id. at 191.”

In the Town of Lauderdale-by-the-Sea, an appeal was filed with the 4th District Court of Appeal from a summary judgment rendered by the trial court holding that the appellant, Town of Lauderdale-by-the Sea, did not abandon, vacate or otherwise convey a portion of a public right-of-way to the appellees but also held that the Town granted the appellees a permissive use of a portion of the Town's public right-of-way. Lauderdale-by-the-Sea v. Meretsky, 773 So.2d 1245 (Fla. 4th DCA 2000). The Court affirmed in part and reversed in part holding that the Town did not abandon, vacate or otherwise convey a portion of public right-of-way and the Town did not grant a permissive use of the same, thus, ordering the appellees to remove a wall constructed on the Town's public right-of-way. Id. at 1249.

The subject issue arose when the appellees filed an application for a zoning variance to request permission to construct an enclosure around a pool. Id. at 1246. The application requested a reduction in the required setback from the property line. Id. Within the application there was no reference that the appellees wanted to intrude on the Town's right-of-way; however, the survey map of the property attached to the application showed that the requested wall enclosure encroached 10 feet into the Town's right-of way. Id. The Town Commission approved the variance request and a building permit was issued for the construction. Id. At some point, the Town Commission directed the Town administration to take action to prevent further construction of the wall. Despite the issuance of a cease and desist order, the wall was completed. Id.

The appellees amended complaint sought a declaratory judgment finding their building permit valid and that a portion of the subject right-of-way inside the wall was vacated and abandoned by the Town. Id. at 1247. The Town responded with a counterclaim seeking injunctive relief and declaratory relief in order to have the wall removed from the Town's right of way. Id. At a summary judgment hearing, Due to the Town's approval of the variance and the issuance of building permits, the trial court determined that the Town's variance approval was “like” the equivalent of the adoption of an ordinance which granted the appellees a permissive use of the Town's right-of-way but the Town did not abandoned or vacate the same. Id.

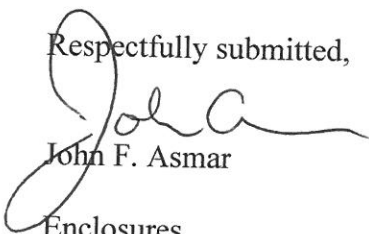
During the appeal, the Town argued that the Town Commission was without authority to grant the appellees' application to build the wall on the public right-of-way as its construction violated the Town's Code of Ordinances. Id. The Appeal Court agreed. Id. At 1249. The Appeal Court opined that whether through the mistake on the part of the parties or through misrepresentation by the appellees, the Town Commission authorized the construction of the appellees' wall surrounding their pool was in violation of the Town's Code of Ordinances. Id. Due to the Town's authorizing an act contrary to its own ordinances, the Town's approval was ultra vires and void. Id. Further,

the Appeal Court held that the issuance of building permit will not estop the government authority from enforcing its ordinances and revoking a permit which had been obtained in violation of its ordinances. Id. at 1247. When there is no authority to grant the permit, the City cannot be estopped from revoking the permit. Id. at 1249. As a result, the Appeal Court reversed the trial court's decision in favor of the appellees and directed the lower court to enter final judgment in favor of the Town and requiring the appellees to remove the way from the Town's right-of-way. Id. at 1249.

Like the holding in Lauderdale-by-the-Sea, whether by mistake or misrepresentation, when the City of Pensacola's City Council approved the subject lease in 2012, the City Council did not have all the facts and unknowingly approved the subject lease and authorized the construction of the tower in violation of Florida Statutes, the City's Plan and the City's LDC. Id. at 1249. Further like Lauderdale-by-the-Sea, the City's errant approval and construction authorization cannot be construed as an adoption of an ordinance amending the City's LDC to allow for the same. Id. At 1247. Pursuant to Chapter 166, there are certain procedures to follow and requirements to be met in order to adopt an ordinance. Id. at 1249. (See also (F.S. § 166.041)). Since the City authorized an act contrary to its own ordinances, the City's approval was ultra vires and void. Id. Lastly, like the holding in Lauderdale-by-the-Sea, the City of Pensacola is not estopped from enforcing its ordinances and revoking the permits issued to or on behalf of Divine World Radio, Inc. which had been obtained in violation of the City's Plan and City's LDC. Id. 1247. When there is no authority to grant the permit, the City cannot be estopped from revoking the permit. Id. at 1249. Therefore, the City is not estopped from requiring the subject tower to be removed. Id.

Based upon the facts as presented, legal research and conclusions contained within my legal opinion dated November 23, 2015, it is my legal opinion the City's aforementioned approved and executed ground lease agreement dated August 24, 2012 and any subsequently issued building permits were acts contrary to Florida Statutes, the City's Plan, and the City's LDC. Florida law prohibits a municipality to exercise its power in violation of the Florida Constitution, Florida Statutes and the City's own governing ordinances. (F.S. § 166.021(1) and (4)). The City lacked the authority to take the above stated actions under Florida Statutes and its own governing laws as defined by the Florida Supreme Court. Liberty Counsel v. Florida Bar Board of Governors, 12 So.3d 183, 191 (Fla. 2009). According to Florida Law and Florida case law, the City's actions were ultra vires acts and therefore, null and void. (F.S. § 166.021(1) and (4)); Liberty Counsel v. Florida Bar Board of Governors, 12 So.3d 183, 189 (Fla. 2009) and Lauderdale-by-the-Sea v. Meretsky, 773 So.2d 1245 (Fla. 4th DCA 2000). Based upon the City's ultra vires acts, the subject tower should be removed. Lauderdale-by-the-Sea v. Meretsky, 773 So.2d 1245, 1249 (Fla. 4th DCA 2000).

Respectfully submitted,


John F. Asmar

Enclosures

Cc: File